No. 80-2164

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RUSSELL G. SCHLENZ and NANCY A. SCHLENZ,
Lake County, Illinois Appellants,

and

GERTRUDE ANDERSON and 1300 CONSOLIDATED CASES,
Shelby County, Illinois Appellants,

v.

JOHN W. CASTLE, ROBERT JASPER, THE LAKE COUNTY, ILLINOIS, BOARD OF REVIEW, SHELBY COUNTY, ILLINOIS and the ILLINOIS PROPERTY TAX APPEAL BOARD,
Appellees.

On Appeal From The Supreme Court Of Illinois

APPELLANTS' BRIEF IN OPPOSITION TO LAKE COUNTY APPELLEES' MOTION TO DISMISS

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INTRODUCTION

Lake County Appellees assert in total disregard of the record that the 1300 Shelby County assessments "will still have to be reviewed by the Property Tax Appeal Board".[1] Lake County Appellees attempt also to collaterally attack an earlier holding of the Supreme Court of Illinois by asserting that none of the plaintiffs "have been prejudiced or injured in any way by either the late publication of assessments, or the enactment of the validation legislation".[2] Appellees then erroneously conclude that this case falls under the mantle of *United States v. Heinszen & Co.*, 206 U.S. 370 (1907) and its successors rather than *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922) and *Ettor v. City of Tacoma*, 228 U.S. 148 (1913) and their progeny and therefor presents "no substantial federal question." Appellees' conclusion fails partly because it is based upon erroneous factual assumptions. The conclusion also fails because Appellees' argument points out the reason that this case presents a substantial federal due process question, namely, the possibility of reaching different conclusions on the same set of facts under the *Forbes* and *Ettor* line of cases on the one hand and the *Heinszen* line of cases on the other hand.

Lake County Appellees' arguments are also supportive of appellants' contention that this case presents a

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[1] Lake County's motion at 6 and also at 9. Statement of Additional Facts, *infra*. It is notable that the Lake County Appellees did not serve either Appellee Property Tax Appeal Board or Appellee Shelby County with their motion.

[2] Motion at 9. *Andrews v. Foxworthy*, 71 Ill. 2d 13, 22-24, 373 N.E. 2d 1332, 1336-1337 (1978).

substantial federal equal protection question. Appellees do not deny (Motion at 14-16) that the legislative classification depriving appellants of their rights to refund was wholely arbitrary (see Jurisdictional Statement at 16-18). Appellees do not contend that the de facto discrimination among injured taxpayers imposed by Public Act 80-1471 was "reasonable" by any standard ever accepted by this Court.

This Court should therefore take plenary jurisdiction and reverse upon the due process and equal protection issues raised by appellants.

STATEMENT OF ADDITIONAL FACTS

The Shelby County case reached the state courts by an administrative review of a final decision of the Illinois Property Tax Appeal Board (Appendix D. A-21)[3] The Property Tax Appeal Board held a "mass hearing" and found that Shelby County's 1976 assessment increases were void (Decision of the Board, Supp. Appendix B, p. SA-7). The Board found that Shelby County's Supervisor of Assessments failure to make timely publication, when she effectively "sat" on the assessments for nine months, was not an excusable error (Decision of the Board, Supp. Appendix B, pp. SA-6, SA-7).

The Circuit Court of Shelby County, the Honorable Daniel H. Dailey, reversed (without remand) and re-

[3] Citation is to the Jurisdictional Statement. Citation to appellants' Supplemental Appendix attached to this Answer will label pages as "SA".

stored the original assessment. (Order of January 23, 1979, Supp. Appendix A, p. SA-2).

The Appellate Court reversed the circuit court affirming the order of the property tax appeal board. (Appendix D, p. A-25).

The Supreme Court of Illinois reversed the Appellate Court and affirmed the judgment of the Circuit Court of Shelby County. There was no remand (Appendix A, p. A-13).

In the Lake County case, the Supreme Court of Illinois remanded "the cause to the circuit court of Lake County to determine whether an appropriate sub-class of plaintiffs can be shown to exist". (Appendix A, p. A-13).

ARGUMENT

I.

LAKE COUNTY APPELLEES' RELIANCE UPON INCORRECT FACTUAL ASSERTIONS EMPHASIZES THE IMPORTANCE OF THE FEDERAL DUE PROCESS ISSUE PRESENTED BY THIS APPEAL.

The Lake County appellees note the existence of competing lines of retrospective taxation cases represented respectively by *Forbes* and by *Heinszen*. A[1]pellees then rely upon totally incorrect assertions of fact in order to argue that this case is completely controlled by *Heinszen*, although the high court of another State, on similar facts, chose to follow the rationale of *Forbes* as anticipated in *Ettor. Washington National Arena Limited Partnership v. Treasurer, Prince George's County*, 410 A.2d 1060 (Md. 1980).

It was factually incorrect to represent to this Court that the Shelby County assessments "will still have to be reviewed by the Property Tax Appeal Board" (Motion at 6, 9). The record does not support the statement. On the contrary, the record shows that the State proceedings are at an end (SA-2, SA-7, A-25, A-13). The Tax Appeal Board order was final (SA-7). Each court's order was a reversal without remand. Nothing further remains to be done unless this Court acts.

It was also factually incorrect to assert that none of the plaintiffs were prejudiced by the late publication (Motion at 9). The assertion runs squarely counter to the Supreme Court of Illinois' holding in *Andrews*. In that case, as appellees allege in this case, each taxpayer "had the same opportunity to appear before the board of review that he would have had if publication had been" timely. 71 Ill. 2d 13, 25, 373 N.E. 2d 1332, 1337

(Underwood, J. dissenting). Nevertheless, the majority found that timely publication is required "for a taxpayer to . . . be able to compare his assessment with other taxpayers". 71 Ill. 2d 13, 22, 373 N.E. 2d 1332. A last minute, rushed hearing before a board of review was presumably held to be an insufficient opportunity for a taxpayer to investigate other assessments and determine the fairness of his own.

In any event, appellees fail to take account of the fact that the failure to make timely publication in Shelby County resulted from the wilful action of the Supervisor (SA-7).

Also, the Court considered in *Andrews* that a taxpayer's right to his prior assessment became vested on the statutory publication date, saying:

> "it is our opinion that the legislature intended that taxpayers can at least rely on the July 10 deadline in nonquadrennial years where increases are not necessarily expected" (71 Ill. 2d 13, 24, 373 N.E. 2d 1332, 1337).

Consequently, it may be presumed that any real property sales after the statutory notice date, for example, were made in expectation that the *status quo* would be maintained. Lake County appellees are, of course, precluded from arguing that the Lake County plaintiffs should have exhausted their administrative remedies. No such state issue can remain in view of the Supreme Court of Illinois remand of the Lake County case for determination of possible sub-classes.

Appellees' misapprehension of the facts removes any possible basis from their contention that the *Heinszen* decision controls this case. Analysis of *Heinszen* and its progeny shows that their conclusion would be suspect in any event. Justice Harlan's concurrence in *Heinszen*

strongly suggests that the principal opinion rested upon grounds unnecessary to the decision. See *Heinszen* at 391. It is undoubtedly true that Congress had the power to withdraw "the consent of the United States to be sued on account of claims of that character" *Id.* Thus, the fact that *Heinszen, Rafferty v. Smith, Bell & Co.*, 257 U.S. 226 (1921) and *Graham v. Goodcell*, 282 U.S. 403 (1931) all deal with the powers of Congress and not of the States makes them poor authority against *Forbes* and *Ettor*, which deal with the power of the States as limited by the Fourteenth Amendment.

Appellees have cited no case construing the Fourteenth Amendment to support their position. This Court should therefore take plenary jurisdiction and reverse the Supreme Court of Illinois upon due process grounds.

II.

APPELLEES HAVE FOUND NO AUTHORITATIVE DECISION SUPPORTING THEM AGAINST APPELLANTS' SUBSTANTIAL CLAIM FOR RELIEF UNDER THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE.

Appellant taxpayers assert that their Fourteenth Amendment right to equal protection was violated by a statute retrospectively and arbitrarily obliterating their right to tax refunds when similarly situated taxpayers had received such refunds. Lake County appellees respond, citing *Heinszen*, that the equal protection clause was not offended by the arbitrary distinction between those who could recover and those who could not according to date of final judgment. Appellees' argument offends both logic and the opinion they cite.

The argument offends logic because the right to recover in fact depended not merely upon the legislative

action but also upon the acts of the County officials, as is seen most clearly in Shelby County. Shelby County obviously appealed the Tax Appeal Board decision because the county officials knew that the curative act was pending in the legislature. Had the County not appealed, the tax appeal board decision would have been final and the curative act would have been of no effect. It would therefore be unrealistic to argue that appellants were barred from recovery merely by a neutral and rational legislative distinction. The Shelby County record shows and the Lake County appellants could show at trial, that they were victimized by special legislation aimed directly at them.[4]

The argument offends *Heinszen* because neither that case nor its cited progeny reached the equal protection issue. *Heinszen* was decided on Fifth Amendment grounds many years before this Court held that "Fifth Amendment . . . due process carries a mandate of equal protection". *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 361 (1973).

Appellees' other case citations are inapt. In *Fisher Controls v. Commonwealth*, 981 A.2d 1253 (Pa. 1977) the legislature had, at the end of the year, raised the tax rate for that year on corporations reporting on a calendar year basis. Fisher Controls was successor to a company that had ceased doing business during the year. The Court, one justice dissenting, noted that Fisher was not challenging the statute and held that Fisher failed to

[4] A principal target of the special legislation may have been the Commonwealth Edison nuclear plant in Lake County. Edison was an *amicus* in the Illinois reviewing courts. See, e.g. the published opinion below.

prove purposeful discrimination in administration. *Fisher* is inaptly cited because, unlike *Fisher*, the present appeal presents a statutory challenge.

Lake Shore Auto Parts holds that Illinois could reasonably distinguish between individuals and corporations for purpose of levying a personal property tax. In the instant case, there was no rational basis for determining which taxpayers would pay taxes on untimely published assessments and which would not.

Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959), similarly to *Lake Shore Auto Parts*, held that there was a rational distinction between Ohio residents and nonresidents for purpose of the *ad valorem* taxation of merchandise or agricultural property stored in a warehouse. The Lake County appellees make no suggestion whatsoever that there was a rational basis supporting the Illinois Legislature's determination that the instant appellants should lose their right to tax refunds, as opposed to taxpayers subjected to earlier or later untimely published assessments.

Appellees have totally failed to support their bare recitation that this case presents no substantial federal question. The equal protection question presented is in fact substantial because the Supreme Court of Illinois opinion is counter to prevailing authority as set out in the Jurisdictional Statement

This Court should reverse upon Equal Protection grounds.

CONCLUSION

The Lake County appellees' motion demonstrates at best, that there are presently conflicting lines of cases from this Court related to retrospective "curative" state statutes validating illegal acts of taxing authorities. That conclusion supports appellants' contention that this case presents substantial federal due process and equal protection questions.

This Court should therefore take this case under its plenary jurisdiction and reverse the Supreme Court of Illinois.

Respectfully submitted,

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Attorneys for Appellants

SUPPLEMENTAL APPENDIX A

[Filed January 23, 1979]

IN THE CIRCUIT COURT FOR THE FOURTH JUDICIAL CIRCUIT OF ILLINOIS SHELBY COUNTY, ILLINOIS

COUNTY OF SHELBY, STATE OF ILLINOIS,

Plaintiff,

No. 78-MR-9 *vs.*

STATE OF ILLINOIS, PROPERTY TAX APPEAL BOARD

Defendant,

and

GERTRUDE ANDERSON,

Taxpayer-Defendant.

ORDER

This cause coming on to be heard upon a Complaint for Administrative Review from the decision of the State of Illinois, Property Tax Appeal Board; and no answer, appearance or other pleading having been filed by the defendants, or any of them, in this cause; and this Court having examined the record herein and having heard the arguments of counsel, hereby FINDS:

1. That it has jurisdiction of the parties hereto and the subject matter hereof.

2. That a copy of the decision of the defendant, Property Tax Appeal Board, filed herein by the attorney for plaintiff, in pertinent part provides:

> "The opinion of the Illinois Supreme Court in *Andrews vs. Foxworthy* 71 Ill. 2d 13 (1978) states that

Section 103 of the Revenue Act of 1939 (Ill. Rev. Stat. 1975, Chap. 120, Par. 584) is mandatory and requires strict and timely compliance. . . .

Therefore, after a complete review of the facts and in consideration of the statutory law as interpreted by the Illinois Supreme Court, the Property Tax Appeal Board finds that the assessment increases on the properties before us are void due to an untimely publication."

3. That the assessed valuation set by the defendant, Property Tax Appeal Board, on the instant cause is $4000 subject to the "state applied multiplier".

4. That the People of the State of Illinois represented in the General Assembly have enacted, prior to any judgment herein, a validating act, duly approved and made effective, validating and making legal and effective all assessments of real property and the extension of taxes on the same, irrespective of a failure to make a timely publication.

5. That the said validating act is applicable to the case at bar.

6. That the instant decision of the defendant, Property Tax Appeal Board, should be reversed.

WHEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED that the instant decision of the defendant, Property Tax Appeal Board, be, and the same is hereby reversed in whole pursuant to Illinois Revised Statutes, Ch. 110, Para. 275(1)(e) and the original assessment of the instant parcel by the Board of Review of Shelby County, Illinois is hereby re-instated.

ENTERED this 23rd day of January, 1979.

/s/ DANIEL H. DAILEY
Judge of the Circuit Court

STATE OF ILLINOIS,
County of Shelby } ss.

I, the undersigned Clerk of the Circuit Court, and Ex-Officio Recorder in and for the said County, in the State aforesaid, do hereby certify the above and foregoing to be a true and complete copy of Order 79-MR-9

as the same appears of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, this 26th day of March A. D. 1979.

Charles P. Bob Hampton
Clerk of the Circuit Court ~~and Ex-Officio Recorder~~.

SA-3

* NOTE: TO BE FILED IN QUADRUPLICATE *

STATE OF ILLINOIS
PROPERTY TAX APPEAL BOARD
303 E. Monroe St.
SPRINGFIELD, ILLINOIS 62706
(217) 782-6076

76-1706-FI

PETITION FOR REAL PROPERTY ASSESSMENT APPEAL FOR THE YEAR 19 77

APPELLANT Gertrude Anderson (If appellant is other than owner, give name & address of owner)

ATTORNEY FOR APPELLANT (If so represented)

ADDRESS 2312 Shelby Avenue

Mattoon 61939 234-2713
City Zip Code Telephone

ADDRESS

City Zip Code Telephone

Petition is hereby made to appeal from the final decision of the Shelby County Board of Review relating to the property described below. Notice of such decision was postmarked on June 27, 1977.
DATE

County Identification Parcel No. 21-27-00-200-001
Address of Property
Township Big Spring Legal Description W ½ NE 80 acs

(Continue on reverse side)

SUPPLEMENTAL APPENDIX B

SA-1

( ) Contention of Law (Attach Brief)
(✓) Overvaluation
( ) Undervaluation

1. ( ) Residential
2. ( ) Commercial
3. ( ) Industrial
4. (✓) Farm
5. ( ) Other

The assessment placed on the real property for said tax year is as follows:

1. By the Assessor	Land $ 2325.-	Impr.	Total $ 2325.-
2. By the Board of Review:	Land $ 2325.-	Impr.	Total $ 2325.-
3. Appellant's claim:	Land $ 18,600	Impr.	Total $ 18,600

LINES NO. 1, 2 AND 3 MUST BE COMPLETED - INFORMATION AVAILABLE AT BOARD OF REVIEW

Date July 22, 1977 APPELLANT OR AGENT Gertrude Anderson
Margaret M. Haviland, atty in fact

STATE TAX APPEAL BOARD'S DECISION

The State Tax Appeal Board from the facts and exhibits presented finds the decision of Shelby County Board of Review to be incorrect and that the correct assessed valuation of the property is:

LAND 4000 IMPR. _____ TOTAL 4000

_____ Chairman

DISSENTING: _____

_____ Member

DATE _____

_____ Member

DOCKET NUMBER 76-1706-F-1

_____ Clerk, Property Tax Appeal Board

Final administrative decisions of the Property Tax Appeal Board are subject to review in the Circuit Court under the provisions of the Administrative Review Act. A complaint for such review must be filed within 35 days of the date of this decision.

PTAB-1 (4-74)

SA-5

The appellants, Members of the Shelby County Taxpayers Association, appealed their 1976 property tax assessments. The appellants are represented by Attorneys Robert L. Jennings and Patrick M. Flynn of the Firm of Jennings, Tedesco & Flynn and also Mr. Vernon L. Plummer.

The appellants contend that the assessment increases are invalid or in the alternative that the valuations determined for the appellants' properties by the Shelby County Board of Review from the Cole-Layer-Trumble Company reappraisal are inequitable because Cole-Layer-Trumble personnel used inappropriate soil maps and the staff was incompetent.

The Shelby County Board of Review is represented by Mr. E. C. Eberspacher, Shelby County's State's Attorney. At the hearing conducted April 26, 1978, Mr. Eberspacher filed a written objection to the "Mass Hearing." This objection was overruled by Chairman Morris due to the discussion at a prehearing conference held at the Springfield office of the Property Tax Appeal Board before the "Mass Hearing" was set. Oral objection to the mass hearing was received from the State's Attorney approximately two weeks before the actual hearing date.

The Property Tax Appeal Board finds that the following uncontroverted facts were established in the record:

1. Cole-Layer-Trumble Company performed appraisal work in Shelby County during 1975.
2. Cole-Layer-Trumble Company's final work product which was specified under a contract, "Exhibit No. 1", was completed and delivered to the Supervisor of Assessments' Office in March, 1976.
3. On or about December 6, 1976, notices of changes in assessments were mailed by the Supervisor of Assessments to Shelby County Taxpayers.
4. December 10, 1976, the asessment changes were published.

5. All appellants in these proceedings had received an assessment increase and have had a hearing before the Shelby County Board of Review.
6. The Supervisor of Assessments testified on page 32 of the transcript of the proceedings:

   ". . . I believe in September before the Board meeting they assured the County Board tat if we assessed a 33⅓ we would receive a one multiplier and that is what we were waiting on to actually put the assessment on until we were sure that it was an assessment that would not increase with the multiplier."

The Property Tax Appeal Board has jurisdiction to determine the threshold legal issue whether assessment increases in a non-quadrennial year are valid without the publication of the intended changes by the Supervisor of Assessments before July 10th as required by statute.

The opinion of the Illinois Supreme Court in *Andrews vs. Foxworthy* 71 Ill.2d 13 (1978) states that Section 103 of the Revenue Act of 1939 (Ill. Rev. Stat. 1975, Chap. 120, Par. 584) is mandatory and requires strict and timely compliance.

The Property Tax Appeal Board finds that the Supervisor of Assessments' failure to make timely publication is not saved or excused by the fact that her office is understaffed and that such an inability to comply with the publication date is not the type of clerical error specified under Section 235 of the Revenue Act of 1939 (Ill. Rev. Stat. 1975, Chap. 120, Par. 716).

Therefore, after a complete review of the facts and in consideration of the statutory law as interpreted by the Illinois Supreme Court, the Property Tax Appeal Board finds that the assessment increases on the properties before us are void due to an untimely publication.

Upon ruling by the Property Tax Appeal Board, all cases were combined in one hearing and one signed

decision is made for all cases. The correct assessed valuation is indicated on the PTAB-1 for each parcel and is subject only to the state applied multiplier.

_____
Chairman

_____
Member

_____
Member

DATE August 17, 1978

_____
Clerk